LAW HOCK KEY & ANOR

v.

YAP MENG KAN & ORS

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-170-2006]
26 FEBRUARY 2008

CIVIL PROCEDURE: *Action - Disposal of action without trial - Beneficiary's action for breach of trust - Limitation - Letters of administration - Locus standi - Grounds of support – Rules of the High Court 1980, O. 14A - Limitation Act 1953, ss. 22(1)(b), 23*

SUCCESSION: *Administration - Administration action - Beneficiary's action for breach of trust - Disposal of action without trial - Limitation - Letters of administration - Locus standi - Grounds of support - Rules of the High Court 1980, O. 14A - Limitation Act 1953, ss. 22(1)(b), 23*

LIMITATION: *Administration action - Beneficiary's action for breach of trust - Disposal of action without trial - Limitation - Letters of administration - Locus standi - Grounds of support - Rules of the High Court 1980, O. 14A - Limitation Act 1953, ss. 22(1)(b), 23*

TRUSTS: *Administration of estate - Duties of trustees/fiduciaries - Beneficiary's action for breach of trust - Disposal of action without trial - Limitation - Letters of administration - Locus standi - Grounds of support - Rules of the High Court 1980, O. 14A - Limitation Act 1953, ss. 22(1)(b), 23*

This was an appeal by the defendants against the decision of the High Court allowing the plaintiffs' claim against the defendants in relation to the administration of the estate of one Low Moh, deceased. The plaintiffs were the lawful issues of their mother, one Bon Tong, and the lawful grandchildren of Low Moh, Bon Tong's father. The defendants were the lawful sons of Low Moh. The plaintiffs' mother died intestate on 22 September 1966, predeceasing her father. Low Moh died intestate on 11 January 1977, leaving behind a lawful widow and ten lawful children surviving him, including the defendants. By grant of Letters of Administration dated 14 October 1977 issued by the High Court,

A the defendants, being the maternal uncles of the plaintiffs, were jointly appointed as administrators of Low Moh's estate. The 2nd defendant died intestate on 23 February 1999, leaving the 1st defendant as the sole surviving administrator of the estate.

B The plaintiffs claimed that by virtue of the provisions of the Distribution Ordinance 1958 ('Ordinance') and the terms of a written agreement dated 9 April 1983 ('Deed of Family Arrangement'), the plaintiffs were entitled to a share in some of the land in Low Moh's estate. They further averred that the C defendants, who were allegedly their trustees in relation to the estate and had from time to time distributed the assets to the deceased's widow and his ten surviving children, had committed breaches of trust against the plaintiff. The defendants submitted their defence and the plaintiffs sought to dispose of this action by D filing a summons in chambers pursuant to O. 14A of the Rules of the High Court 1980 ('RHC'). The following three questions of law were framed by the plaintiffs for determination by the court: (i) whether the plaintiffs' claim against the defendants was statute-barred under ss. 6 and 23 of the Limitation Act 1953 ('LA'); (ii) E whether representation to the estate of the plaintiffs' mother, Bon Tong, must first be granted to the plaintiffs before they, as beneficiaries of Low Moh's estate, were entitled to claim against the defendants; and (iii) whether the plaintiffs were entitled to claim against the defendants notwithstanding the plaintiffs' mother F had predeceased her father, Low Moh. The judicial commissioner allowed the plaintiffs' application, resulting in the present appeal.

Held (allowing the appeal)
Per Hasan Lah JCA delivering the judgment of the court:

G **(1)** There was no question or dispute of fact in this action and the action could be disposed off by determining the three questions of law framed by the plaintiffs under O. 14A r. 1 of the RHC. The defendants' contention that the action should have proceeded to a full trial to allow extrinsic evidence to be H adduced in relation to the allegations of breach of trust whereby certain things needed verification, had no merit. The defendants had admitted that they had made distributions of the assets of Low Moh's estate to the other beneficiaries to the exclusion of the plaintiffs, and the defendants had specified I the balance currently held by them. When the defendants made distribution to the beneficiaries, they did so as trustees under the statutory trust in accordance with s. 6 of the

Ordinance and when the defendants failed to make distributions to the plaintiffs, the defendants had committed breach of trust. (paras 32, 33 & 34)

(2) On the issue of limitation, s. 22(1) of the LA supersedes s. 23 of the LA because s. 22(1) expressly states that no period of limitation prescribed by the LA shall apply to an action within s. 22(1). The plaintiffs' action was purely a claim against the defendants personally and not against the estate and, therefore, s. 23 of the LA did not apply. Under s. 22(1)(b) of the LA, the trustee must either be in possession of the trust property or must have converted the trust property to his own use. In this case, both administrators *ie*, the 1st and 2nd defendants, were also beneficiaries of the estate and as beneficiaries, they had been taking shares in the trust properties. As such, they were in possession of the trust properties or the proceeds thereof, and/or having converted the same to their own use, the defendants were liable to personally make good the full share of the plaintiffs' entitlement to the deceased's estate. (paras 36 & 37)

(3) Since the plaintiffs were claiming their deceased mother's right in Low Moh's estate, they had to obtain the letters of administration in respect of their mother's estate in order to entitle them to bring this action against the defendants. They had to establish that they had legal title to sue the defendants. They were the beneficiaries of their mother's estate but they were not the legal representatives of the estate as they had not applied for the letters of administration in respect of their mother's estate. As such, they had no *locus standi* to bring this action against the defendants. *Deraman & Ors v. Mek Yam* (foll). (para 45)

(4) There was another reason why the decision of the judicial commissioner could not be sustained. It had to do with the Deed of Family Arrangement. The plaintiffs did not produce or exhibit the Deed of Family Arrangement to support their application under O. 14A of the RHC and, as such, the court was not in a position to decide whether the plaintiffs were entitled to make a claim under the Deed of Family Arrangement. The defendants, in their defence, denied that the plaintiffs were entitled to make a claim under the Deed of Family Arrangement. (para 46)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan defendan-defendan terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan plaintif-plaintif terhadap defendan-defendan berhubung pentadbiran pusaka
B seorang Low Moh, simati. Plaintif-plaintif adalah anak-anak kepada ibu mereka, seorang Bon Tong, dan adalah juga cucu-cucu kepada Low Moh, ayah Bon Tong. Manakala defendan-defendan adalah anak-anak lelaki Low Moh. Ibu plaintif-plaintif meninggal dunia tanpa berwasiat pada 22 September 1966, iaitu sebelum kematian
C bapanya. Low Moh meninggal dunia juga tanpa berwasiat pada 11 Januari 1997, dan meninggalkan seorang balu dan sepuluh orang anak, termasuk defendan-defendan. Melalui pemberian Surat Kuasa Mentadbir bertarikh 14 Oktober 1977 yang dikeluarkan oleh Mahkamah Tinggi, defendan-defendan, selaku bapa saudara sebelah
D ibu kepada plaintif-plaintif, telah dilantik sebagai pentadbir bersama pusaka Low Moh. Defendan kedua meninggal dunia tanpa berwasiat pada 23 Februari 1999, sekaligus meninggalkan defendan pertama sebagai satu-satunya pentadbir pusaka yang masih hidup.

E Plaintif-plaintif menuntut bahawa berdasarkan peruntukan Ordinan Pembahagian 1958 ('Ordinan') dan terma-terma perjanjian bertulis bertarikh 9 April 1983 ('Suratikatan Penyelesaian Keluarga'), plaintif-plaintif berhak kepada sebahagian dari tanah-tanah di dalam pusaka Low Moh. Mereka seterusnya mengatakan bahawa
F defendan-defendan, yang mereka dakwa adalah pemegang amanah mereka berhubung dengan pusaka dan yang telah mengagihkan aset-aset pusaka kepada balu simati dan sepuluh anak-anaknya yang masih hidup dari masa ke semasa, telah melakukan pecah amanah terhadap plaintif-plaintif. Defendan-defendan mengemukakan
G pembelaan mereka dan plaintif-plaintif memohon untuk melupuskan tindakan di sini dengan memfail saman dalam kamar di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Tiga persoalan undang-undang berikut telah dirangka oleh plaintif-plaintif untuk keputusan mahkamah, iaitu: (i) sama ada tuntutan plaintif-
H plaintif terhadap defendan-defendan dihalang oleh statut di bawah ss. 6 dan 23 Akta Had Masa 1953 ('LA'); (ii) sama ada representasi kepada pusaka ibu plaintif-plaintif, Bon Tong, hendaklah terlebih dahulu diberikan kepada plaintif-plaintif sebelum mereka, selaku benefisiari-benefisiari kepada pusaka Low Moh,
I berhak menuntut terhadap defendan-defendan; dan (iii) sama ada plaintif-plaintif berhak menuntut terhadap defendan-defendan walaupun ibu plaintif-plaintif telah meninggal dunia lebih awal dari

bapanya, Low Moh. Pesuruhjaya Kehakiman membenarkan permohonan plaintif-plaintif, sekaligus membawa kepada rayuan di sini.

Diputuskan (membenarkan rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Tidak ada persoalan atau pertikaian fakta dalam tindakan di sini dan tindakan boleh dilupuskan melalui jawapan kepada ketiga-tiga persoalan yang dikemukakan oleh plaintif-plaintif di bawah A. 14A k. 1 KMT. Hujah defendan-defendan bahawa tindakan harus dibawa ke perbicaraan penuh bagi membolehkan keterangan extrinsik dikemukakan berkaitan dakwaan pecah amanah di mana beberapa perkara memerlukan penjelasan, adalah tidak bermerit. Defendan-defendan telah mengakui bahawa mereka telah membuat pengagihan aset-aset pusaka Low Moh kepada benefisiari-benefisiari kecuali plaintif-plaintif, dan telah juga menjelaskan mengenai baki yang kini berada di tangan mereka. Apabila defendan-defendan membuat pengagihan kepada benefisiari-benefisiari, mereka berbuat demikian selaku pemegang-pemegang amanah di bawah amanah statutori selaras dengan s. 6 Ordinan, dan bilamana mereka gagal membuat pengagihan kepada plaintif-plaintif maka mereka telah melakukan pecah amanah.

(2) Mengenai isu had masa, s. 22(1) LA mengatasi s. 23 LA kerana s. 22(1) secara ekspres menyatakan bahawa tiada tempoh had masa seperti yang ditetapkan LA terpakai kepada tindakan di bawah s. 22(1). Tindakan plaintif-plaintif adalah semata-mata satu tindakan peribadi terhadap defendan-defendan dan bukan terhadap pusaka, dan kerana itu, s. 23 LA tidak terpakai. Di bawah s. 22(1)(b) LA, pemegang amanah perlu mempunyai milikan harta amanah atau perlu menyalah guna harta amanah untuk manfaat dirinya sendiri. Dalam kes disini, kedua-dua pentadbir, iaitu defendan-defendan pertama dan kedua, adalah benefisiari-benefisiari kepada pusaka, dan selaku benefisiari mereka telah mengambil bahagian mereka di dalam harta-harta amanah. Oleh itu, mereka mempunyai milikan harta amanah atau hasil-hasilnya, dan/atau telah menyalah guna harta-harta tersebut untuk manfaat diri mereka, sekaligus menjadikan mereka bertanggungan untuk mengganti secara peribadi sepenuhnya bahagian pusaka simati yang terhak kepada plaintif-plaintif.

(3) Oleh kerana plaintif-plaintif menuntut hak ibu mereka yang telah meninggal dunia terhadap pusaka Low Moh, maka mereka perlulah mendapatkan surat kuasa mentadbir pusaka ibu mereka sebelum boleh membawa tindakan terhadap defendan-defendan. Mereka perlu membuktikan bahawa mereka mempunyai hak di sisi undang-undang untuk mendakwa defendan-defendan. Mereka adalah benefisiari-benefisiari kepada pusaka ibu mereka, tetapi mereka bukanlah wakil pusaka tersebut memandangkan mereka tidak memohon surat kuasa mentadbir bagi pusaka tersebut. Plaintif-plaintif, dengan itu, tiada *locus standi* untuk membawa tindakan terhadap defendan-defendan di sini. *Deraman & Ors v. Mek Yam* (diikuti).

(4) Terdapat satu lagi sebab mengapa keputusan pesuruhjaya kehakiman tidak boleh dipertahankan. Ianya bersabit dengan Suratikatan Penyelesaian Keluarga. Plaintif-plaintif tidak mengeksibitkan atau mengemukakan Suratikatan Penyelesaian Keluarga bagi menyokong permohonan mereka di bawah A. 14A KMT, dan kerana itu, mahkamah tidak boleh memutuskan sama ada plaintif-plaintif berhak membuat tuntutan di bawah Suratikatan Penyelesaian Keluarga. Defendan-defendan, dalam pembelaan mereka, telah menafikan bahawa plaintif-plaintif berhak membuat tuntutan di bawah Suratikatan Penyelesaian Keluarga.

Case(s) referred to:
Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(foll)***

Legislation referred to:
Distribution Ordinance 1958, ss. 6, 7(1)
Limitation Act 1953, ss. 6, 22(1)(b), 23
Rules of the High Court 1980, O. 14A r. 1, O. 15 r. 6A(4)(b)

Limitation Act 1980 [UK], s. 21(1)(b), (2)
Limitation Amendment Act 1980 [UK], s. 5(2)

Other source(s) referred to:
Terence Prime and Gary Scanlan, *The Modern Law of Limitation,* p 215

For the appellants - Basil Anthony (Dinesh Nair with him); M/s How, Zul & Low
For the respondents - Sri Dev Nair (Jasmeet Pal Singh with him); M/s Siew & Jasmeet

[Appeal from High Court, Kuala Lumpur; Suit No: S7-22-148-2005]

Reported by Suresh Nathan

JUDGMENT

Hasan Lah JCA:

Introduction

[1] This is an appeal by the defendants against the decision of the High Court at Kuala Lumpur dated 5 January 2006 whereby the High Court had allowed the plaintiffs' claim against the defendants.

[2] On 25 June 2007, after hearing submissions of counsel from both parties, we allowed the appeal with costs.

Facts Of The Case

[3] The plaintiffs are the lawful children and lawful issues of their mother, Bon Tong @ Low Boon Siew.

[4] The plaintiffs' mother was the lawful daughter and issue of her father, Low Moh, deceased.

[5] The plaintiffs are the lawful grandchildren and lawful issues of Low Moh, deceased.

[6] The defendants are the lawful sons and lawful issues of the said Low Moh, deceased.

[7] The 2nd defendant, Low Huck Tuck @ Low Hock Tay is now deceased.

[8] The plaintiffs' mother and the defendants were siblings.

[9] The plaintiffs' mother died intestate on 22 September 1966. She predeceased her father, Low Moh.

[10] The said Low Moh died intestate on 11 January 1977 leaving behind a lawful widow and ten lawful children surviving him, including the defendants.

[11] By grant of Letters of Administration dated 14 October 1977 issued by the High Court of Kuala Lumpur, the defendants (being maternal uncles of the plaintiffs) were jointly appointed as administrators of the estate of Low Moh, deceased.

[12] The co-administrator (the 2nd defendant – Low Hock Tuck @ Low Hock Tay) died intestate on 23 February 1999, leaving the 1st defendant as the sole surviving administrator of the estate of Low Moh, deceased.

[13] Assets of the estate of Low Moh, deceased were:

(a) 1/10 portion in each of the 22 pieces of land in Mukim Klang, Seksyen 1, Port Swettenham;

(b) Land known as C.T. 10102 Lot 390, Seksyen 67, Bandar Kuala Lumpur;

(c) 1/2 of the unindivided portion in each of two pieces of land known as C.T. 11023 Lot 3910 and EMR 2426 Lot 1168 both the same in Mukim Kuala Lumpur;

(d) 1/8 portion in each of the five pieces of land in Mukim Batu Segambut;

(e) fixed deposit receipt no. 030686 in Lee Wah Bank, Medan Pasar Kuala Lumpur for the amount of RM185,222.50;

(f) fixed deposit receipt no. 030687 in Lee Wah Bank, Medan Pasar Kuala Lumpur for the amount of RM40,275;

(g) Cash to the amount of RM279,419.07 in Kwong Yik Bank, Jalan Bandar, Kuala Lumpur.

(h) a business (inclusive of goodwill) known as Low Moh Lorry service at No. 2, Foch Avenue, Kuala Lumpur valued at RM61,447.60; and

(i) five cars valued at RM7,200.

[14] Liabilities and expenses of the estate of Low Moh, deceased were:

(a) income tax for the year of 1976: RM23,664.80

(b) income tax for the year of 1977: RM45,809.35

(c) funeral expenses: RM1,000

The Plaintiffs' Claim Against The Defendants

[15] The plaintiffs claim that by virtue of the provisions of the Distribution Ordinance 1958 and the terms of a written agreement dated 9 April 1983 ("the Deed of Family Arrangement"), the

plaintiffs are entitled to 1/9th share in one of the 22 pieces of land set-out in para. 11(a) above ie, the land held under H.S. (M) 3043, P.T. No. 395 Mukim of Klang, Section 1, Port Swettenham.

[16] The plaintiffs also claim that by virtue of the provisions of the Distribution Ordinance 1958 and the terms of the Deed of Family Arrangement, the plaintiffs are entitled to:

(a) 1/9th share in the land set out in para 11(b) above ie, the land known as C.T. 10102 Lot 390, Seksyen 7, Bandar Kuala Lumpur;

(b) 1/9th share in three shop lots and seven double storey terrace houses built on parts of the two assets set out in para. 11(c) above ie, 1/2 of the undivided portion in each of two pieces of land known as C.T. 11023 Lot 390 and EMR 2426 Lot 1168 both the same in Mukim Kuala Lumpur;

(c) 2/33rd share in the remainder of the two assets set out in para. 11(c) above;

(d) 1/9th share in the assets set out in para. 11(d) above ie, 1/8 portion in each of the five pieces of land in Mukim Batu Segambut;

(e) 2/33rd share in the nett balance and nett proceeds of the assets set out in paras. 11(e) to 11(i) above.

[17] The plaintiffs claim that the defendants are their trustees in relation to the estate of Low Moh and had from time to time distributed the assets to the deceased's widow and the ten surviving children of the deceased.

The Plaintiffs Allegations Of Breach Of Trust

[18] The plaintiffs allege that the defendants had committed breaches of trust against the plaintiffs as per the following:

(a) that on or about May 1983, the defendants had sold the asset known as C.T. 10102 Lot 390, Seksyen 67, Bandar Kuala Lumpur to IBA Resources Sdn. Bhd. – no accounts or proceeds were given and/or were distributed to the plaintiffs;

(b) that under a joint venture agreement dated 6 October 1971 to develop the parts of the assets known as C.T. 11023 Lot 3910 and EMR 2426 Lot 1188 both in Mukim of Kuala

Lumpur the estate of Low Moh was allegedly paid in kind by way of three shop lots and seven double storey terrace houses – there was no independent valuation of the shop lots and double storey terrace houses and an apportionment of the same were not given and/or distributed to the plaintiffs;

(c) that the estate of the deceased was paid compensation to the amount of RM429,288.66 for compulsory land acquisition for parts of the assets known as C.T. 11023 Lot 3910 and EMR 2426 Lot 1188 both in the Mukim of Kuala Lumpur – no proceeds were given and/or were distributed to the plaintiffs;

(d) that by virtue of several tenancies granted in respect of the assets set out in para. 11(d) of the statement of defence, the estate of Low Moh has derived income from the same since the death of Low Moh, deceased – no accounts or proceeds were given and/or were distributed to the plaintiffs;

(e) that the defendants has not rendered to the plaintiffs complete accounts of the balance proceeds from the assets set out in para. 11(e) to (i) of the statement of defence and also the accounts from Low Moh's funeral, testamentary, administration expenses, debts and liabilities. The plaintiffs allege that no accounts or proceeds were given and/or were distributed to the plaintiffs.

The Defendants' Defence

[19] The defendants' defence, in gist, were as follows:

(a) the plaintiffs' claim is statute barred under the provisions of the Limitation Act;

(b) the plaintiffs have no *locus standi* to bring this action as Letters of Administration has not been taken out in respect of the estate of plaintiffs' mother and no representation has been granted to the said estate;

(c) the plaintiffs have no claim in the estate of Low Moh as the plaintiffs mother had predeceased her father, Low Moh;

(d) the defendants deny the allegation of breach of trust and assert that the estate of Low Moh was distributed in accordance with the law.

The O. 14A Proceedings

[20] The plaintiffs sought to dispose off this action by filing a summons in chambers pursuant to O. 14A of the Rules of the High Court 1980. Three questions of law were framed by the plaintiffs for determination by the court, namely:

(a) whether the plaintiffs' claim against the defendants is statute barred under ss. 6 and 23 of the Limitation Act 1953;

(b) whether representation to the estate of the plaintiffs mother (Bon Tong @ Low Boon Siew) must first be granted to the plaintiffs before they, as beneficiaries of the estate of Low Moh, deceased are entitled to claim against the defendants;

(c) whether the plaintiffs are entitled to claim against the defendants notwithstanding the plaintiffs' mother (Bon Tong @ Low Boon Siew) had predeceased her father, Low Moh.

[21] Apart from reiterating the above points of law for determination, the plaintiffs have not offered any evidence in their affidavit in support for their application under O. 14A.

[22] The defendants in their affidavit in reply had resisted the plaintiffs application under O. 14A on the basis that there are questions of mixed fact and law which have to be addressed and decided by the court.

[23] The plaintiffs merely denied the existence of questions of mixed fact and law in their affidavit in reply and continued to assert that this action could be disposed off under O. 14A.

Decision Of The High Court

[24] The learned Judicial Commissioner who heard the application has allowed the application by the plaintiffs to have the whole matter disposed off under O. 14A r. 1 of the Rules of the High Court 1980 as she was of the view that there was no question or dispute of fact because the relationship of the parties as well as assets and liability and expenses of the estate are all expressly admitted by the defendants.

[25] In his submission before the learned Judicial Commissioner the learned counsel for the defendants submitted on two points only, namely:

A (a) that the 2nd defendant had not been properly cited as Letters of Administration to the estate of Law Hock Tuk @ Low Hock Tay, deceased has been granted, and

(b) that the plaintiffs' claim against the defendants is statute –
B barred under s. 6 and s. 23 of the Limitation Act 1953.

[26] From that submission the learned Judicial Commissioner concluded that the defendants are not disputing questions no. 2 and no. 3 in the application as the defendants had conceded that:

C (a) there is no need for the letters of administration to the estate of the plaintiffs' deceased mother (Bon Tong @ Low Boon Siew) to be granted to the plaintiffs before they, as beneficiaries to their mother's estate, are entitled to claim against the defendants; and

D

(b) the plaintiffs are entitled to claim against the defendants notwithstanding that the plaintiff's mother Bon Tong @ Low Boon Siew had predeceased her father (Low Moh).

E **[27]** With regard to the issue of the citation of the 2nd defendant the learned counsel for the defendants submitted that since the letter of administration to the estate of Law Hock Tuck @ Low Hock Tay, deceased, had been granted the personal representative should be cited as the 2nd defendant. The learned
F Judicial Commissioner agreed with the submission of the learned counsel for the defendants and she invoked the powers given under O. 15 r. 6A(4)(b) to amend the citation of the 2nd defendant to "Low Khen Meng and Low Khen Khoo as Personal Representative of Law Hock Tuck @ Low Hock Tay, deceased".

G **[28]** With regard to the issue of limitation the learned Judicial Commissioner held that the plaintiffs are not barred under s. 6 and s. 23 of the Limitation Act 1953 to bring this action against the defendants by virtue of s. 22(1) of that Act. Accordingly the learned Judicial Commissioner allowed the plaintiffs' application.

H

The Appeal

[29] In their memorandum of appeal the defendants have set out ten grounds of appeal. In para. 1 of memorandum of appeal the
I defendants said that the learned Judicial Commissioner erred in fact and law in finding that there is no question or dispute of fact and as such decided to have the whole matter disposed off under O. 14A r. 1 of the Rules of the High Court.

[30] It was the contention of the learned counsel for the defendants that the three questions of law framed by the plaintiffs is wrong and misconceived as their claim is based on the alleged breach of trust by the defendants. According to the learned counsel for the defendants the question of law which should have been framed by the plaintiffs is whether the defendants had committed the breach of trust alleged. The learned counsel for the defendants submitted that in order to prove the alleged breach of trust a full trial of the action is required for the purposes of evaluating extrinsic evidence in relation to the breach of trust as this involved questions of facts and questions of mixed law and facts.

[31] On this issue the learned counsel for the plaintiffs submitted that the defendants' statement of defence did not raise any issue of fact. By reason of the matters expressly admitted to or the matters not denied by the defendants in their statement of defence, there is no question or dispute of fact arising in this cause or matter.

[32] After having given a careful consideration to the submissions made by the counsel for the plaintiffs and the defendants on this issue and the pleadings filed in this action we hold that the learned Judicial Commissioner was right in her finding that there is no question or dispute of fact in this action and the action could be disposed off by determining the three questions of law or framed by the plaintiffs under O. 14A r. 1 of the Rules of the High Court. A perusal of the pleadings will show that:

i) the defendants have admitted (at para. 6 of the defence) the list of assets of the deceased Low Moh as pleaded in para. 13 of the statement of claim;

ii) the defendants have admitted (at para. 13 and 16 of the defence) that they had made distribution of the assets of the estate of Low Moh;

iii) on the premise that the plaintiffs are not beneficiaries and/or that the plaintiffs' claim is time barred, the defendants have not made any distribution to the plaintiffs;

iv) in para. 16 of the defence the defendants have specified the balance of the assets currently held by them; and

A v) the defendants have admitted that Bon Tong is the lawful daughter of her father Low Moh, the deceased and that the plaintiffs are the lawful children of their mother, Bon Tong.

[33] Under paras. 3, 4, 8 and 9 of the memorandum of appeal
B the defendants contended that the action should have proceeded to a full trial to allow extrinsic evidence to be adduced in relation to the allegations of breach of trust whereby there was a need to verify the accuracy of:

C i) the sale of the deceased's properties;

ii) the development of the deceased's properties;

iii) the proceeds derived from the deceased's properties;

D iv) the liabilities and expenses of the deceased's estate;

v) the monies of the deceased's estate currently and previously held by the defendants;

vi) the accounts kept by the defendants for the estate of the
E deceased.

[34] We find that this argument has no merit. In the statement of defence the defendants have admitted that they had made distribution of the assets of the estate of Low Moh to the other
F beneficiaries to the exclusion of the plaintiffs and the defendants have specified the balance currently held by them. When the defendants made distribution to the beneficiaries they did so as trustees under the statutory trust in accordance with s. 6 of the Distribution Ordinance 1958 and when the defendants failed to
G make distribution to the plaintiffs the defendants had committed breach of trust.

[35] Paragraph 5 and 6 of the memorandum of appeal relate to the issue of limitation. It was submitted by the learned counsel for the defendants that the plaintiffs are statute barred by the
H Limitation Act 1953 in commencing this action against the defendants as the plaintiff have commenced this action 28 years after the death and grant of the Letters of Administration of the deceased estate. It was also submitted that in relation to the alleged breach of trust and also since conversion of trust property
I has not been proved the plaintiffs should have commenced this action not more than six years from the said breach of trust.

[36] On this issue of limitation we agree with the submission of the learned counsel for the plaintiffs and the finding of the learned Judicial Commissioner that s. 22(1) of Limitation Act 1953 supersedes s. 23 because s. 22(1) expressly states that no period of limitation prescribed by the Limitation Act shall apply to an action within s. 22(1). For ease of reference ss. 22 and 23 of the Limitation Act 1953 are reproduced below:

> 22(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued;
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.
>
> (3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.
>
> 23. Limitation of actions claiming personal estate of a deceased person.
>
> Subject to the provisions of section 22(1) of this Act, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

[37] The plaintiffs' action is purely a claim against the defendants personally and not against the estate and therefore s. 23 of the Limitation Act 1953 does not apply. Under s. 22(1)(b) the trustee must either be in possession of the trust property or must have converted the trust property to his own use. In this case both administrators ie, the 1st defendant and Law Hock Tuk are also beneficiaries of the estate and as beneficiaries they have been taking shares in the trust properties. As such, they are in possession of the trust properties or the proceeds thereof. As persons in possession of the trust properties or the proceeds thereof and/or having converted the same to their own use, the defendants are liable to personally make good the full share of the plaintiffs' entitlement to the deceased's estate.

[38] As rightly submitted by the learned counsel for the plaintiffs our s. 22(1)(b) is derived from the English Limitation Act 1939 which had undergone amendments. The corresponding provision now is s. 21(1)(b) of the English Limitation Act 1980. A comparison of the Malaysian provision (s. 22) and the English provision (s. 21) reveals that the English provision has one additional sub-section ie, sub-s. (2). This sub-section was inserted in England by s. 5 of the Limitation Amendment Act 1980. That sub-s. (2) provides:

> (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share.
>
> This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

[39] In the circumstances the position and the law in England on the application and interpretation of this statutory provision is directly relevant and extremely useful. In *The Modern Law of Limitation* by Terence Prime and Gary Scanlan the following commentary was made at p. 215:

> Section 21(1)(b) provides that there is no limitation period in respect of an action undertaken by a beneficiary under a trust which is an action either: 1) to recover trust property from the trustee; or 2) to recover the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

> Section 21(1)(b) is restricted to actions against trustees. However, it covers both actions to recover trust property still in the trustees' possession and to recover the proceeds of trust property previously received and converted to the trustee's own use.

[40] We agree that the action by the plaintiffs falls under s. 22(1)(b) of the Limitation Act 1953 and the plaintiffs are bringing this action against the trustees and not the estate.

[41] In her grounds of judgment the learned Judicial Commissioner has ruled that the defendants had conceded that:

(a) there is no need for the letters of administration to the estate of plaintiffs' deceased's mother (Bon Tong @ Low Boon Siew) to be granted to the plaintiffs before they, as beneficiaries to their mother's estate, are entitled to claim against the defendants; and

(b) the plaintiffs are entitled to claim against the defendants notwithstanding that the plaintiff's mother had predeceased her father.

[42] In his submission before the learned Judicial Commissioner learned counsel for the defendants said in para. 8 of his written submission dated 28 September 2005 as follows:

> 8. If this Court ruled that this Court will hear this application then I will submit the issue of limitation first reserving the right to submit as the other issues.

[43] It is our view that the defendants did not make any concession on the other two issues. We therefore asked the learned counsel for the plaintiffs to submit on the second issue ie, whether representation to the estate of the plaintiffs' deceased mother (Bon Tong) must first be granted to the plaintiffs before they, as beneficiaries of the estate of Low Moh deceased, are entitled to claim against the defendants. On this issue the learned counsel for the plaintiffs submitted that the plaintiffs did not have to extract the letters of administration for the estate of their mother first before they, as beneficiaries of the estate of Low Moh, deceased, filed their claim against the defendants. This is because by virtue of s. 7(1) of the Distribution Ordinance 1958 the plaintiffs are the direct beneficiaries of the estate of Low Moh. The plaintiffs are beneficiaries as of their own right. They are not

claiming through or under their deceased mother's estate. Under that s. 7(1) when the child of the intestate predeceases the intestate that child's issue (ie, the intestate's grandchildren) will automatically step into that child's shoes and take a share in the intestate's estate. That share is held on trust in equal shares for such grandchildren until they attain the age of 21 or marry under that age, upon which event those grandchildren will have a vested interest and take absolutely.

[44] Under para. 9 of the statement of defence the defendants pleaded that the plaintiffs have no *locus standi* to bring their claims as letters of administration has not been taken out in respect of the estate of the plaintiffs' mother, deceased and no representation has been granted to the said estate. Section 7(1) of the Distribution Ordinance 1958 provides:

> (1) Where under the provisions of section 6, the estate of an intestate or any part thereof is directed to be held on the trusts set out in this section for the issue of the intestate, the same shall be held in trust in equal shares if more than one for all or any of the children or child of the intestate living at the death of the intestate, who attain the age of majority or marry under that age, and for all or any of the issue living at the death of the intestate, who attain the age of majority or marry under that age, of any child of the intestate who predeceases the intestate, such issue to take through all degrees according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is still living at the death of the intestate and so capable of taking.

[45] With respect, we do not agree with the submission of the learned counsel for the plaintiffs on this issue. We are of the view that as the plaintiffs are claiming their deceased mother's right in the estate of her father Low Moh, deceased the plaintiffs have to obtain the letters of administration in respect of the estate of their mother in order to entitle them to bring this action against the defendants. They have to establish that they have legal title to sue the defendants. They are the beneficiaries of their mother's estate but they are not the legal representatives of the estate as they had not applied for the letters of administration in respect of their mother's estate. As such, they have no *locus standi* to bring this action against the defendants. This issue has been decided by the Federal Court in *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20 whereby Ali FJ has made the following observation:

> Furthermore, the appellants have no legal title. They never had. They are only beneficiaries of their father's estate. The only person who could have legal title after their father's death would be the legal representatives of the estate. There was no evidence of any legal representatives having been appointed. On that ground also the appellants have no right to bring an action under section 10(1)(a) of the Ordinance. The action ought to have been dismissed as the appellants have no right or cause of action.

[46] There is one other reason why we think the decision of the learned Judicial Commissioner could not be sustained. It is this. Under para. 17 of the statement of claim the plaintiffs pleaded that:

> 17. By virtue of the provisions of the Distribution Ordinance 1958 and the terms of the deed of Family arrangement, the plaintiffs are entitled to:
>
> (a) a 1/9th share in the asset set out in sub-paragraph 13(b) above;
>
> (b) a 1/9th share in 3 shop lots and 7 double storey terrace houses built on parts of the assets set out in sub-paragraph 13(c) above;
>
> (c) a 2/33rd share in the remainder of the 2 assets set out in sub-paragraph 13(c) above; and
>
> (d) a 1/9th share in the assets set out in sub-paragraph 13(d) above.

The plaintiffs did not produce or exhibit this Deed of Family Arrangement to support their application under O. 14A of the Rules of the High Court 1980. As such the Court was not in a position to decide whether the plaintiffs are entitled to make a claim under that Deed of Family Arrangement. The defendants, in their defence, denied that the plaintiffs are entitled to make a claim under the Deed of Family Arrangement.

[47] For the reasons stated above we unanimously allowed the appeal by the defendants with costs.

[48] My learned brother Suriyadi bin Halim Omar, JCA has seen this judgment in draft and has expressed his agreement with it. My learned brother Mokhtar bin Sidin JCA, however, has retired before this judgment was prepared and as such he did not have the opportunity to see this judgment in draft.